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No. 83-165

IN THE

Supreme Court Of The United States

October Term, 1983

YORK INTERNATIONAL and YORK DIVISION,
BORG-WARNER CORPORATION,
Appellants,

v.

ALABAMA OXYGEN COMPANY, INC.
and THE INDUSTRIAL DEVELOPMENT BOARD
OF THE CITY OF BESSEMER, ALABAMA,
Appellees.

ON APPEAL FROM THE SUPREME COURT
OF ALABAMA

APPELLANTS' REPLY MEMORANDUM

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Appellants respectfully submit this Reply Memorandum to Appellees' Motion to Dismiss.

Appellees contend in their Motion to Dismiss that an appeal is inappropriate because no federal statute has been found unconstitutional. Appellees argue that the Alabama Supreme Court's extensive analysis and holdings regarding the constitutionality of the Federal Arbitration Act were mere dicta not to be considered by this Court in deciding whether to take an appeal of this case. However, to reach this conclusion Appellees must (as did the Alabama court)

ignore this Court's holdings in *Moses Cone*.[1] The Alabama court held that if the Federal Arbitration Act preempts state law then that Act is unconstitutional. 433 So.2d at 1162-63. Since this Court in *Moses Cone* clearly stated that the Federal Arbitration Act preempts state law,[2] unless one is willing to ignore *Moses Cone* the Alabama court has in fact held that the Federal Arbitration Act is unconstitutional.[3]

Appellees compound their error by asserting that no substantial federal question has been raised and then by stating at page 12 of their Motion:

> "It [the decision of the Alabama Supreme Court] is in conflict with no decision of this court or any state court of last resort or federal court of appeals."

Appellees' statement is simply wrong. This Court in *Moses Cone* and the highest courts of several states have held that when an agreement to arbitrate is set forth in a contract evidencing a transaction affecting commerce, Section 3 of the Federal Arbitration Act governs a motion to stay pending arbitration *regardless* of any state policy to the contrary.[4] Decisions of the federal courts of appeals are in

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[1]103 S. Ct. 927 (1983).

[2]This Court held that the Federal Arbitration Act "is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary" (*Id.* at 941); that "federal law in the terms of the Arbitration Act governs [the] issue [of arbitrability] in either state of federal court" (*Id.* at 941); and that "state courts, as much as federal courts, are obligated to grant stays of litigation under § 3 of the Arbitration Act." *Id* at 942.

[3]Appellees' reliance on *Ivanhoe Irrig. Dist. v. McCracken*, 357 U.S. 275 (1958) is misplaced. In *Ivanhoe*, the California Supreme Court decided a point of federal law that had not been previously addressed by this Court. In the instant case, the Alabama Supreme Court ignored prior, express holdings by this Court in *Moses Cone*.

[4]"The supremacy clause resolves any inconsistency between the two laws [state and federal] in favor of the federally created right and subordinates Tennessee state law to the supreme law of the land. We, therefore, hold that the Tennessee courts must recognize and apply the

accord.[5] Thus, while appellants are convinced that an appeal is proper, certiorari is also proper.[6]

Appellees assert that the decision of the Alabama Supreme Court is not a final order because Alabama does not recognize the traditional "law of the case" doctrine. However, the statute relied on by the Appellees provides nothing more than a second opportunity for a rehearing before the Supreme Court of Alabama.[7] The rules and decisions of this Court do not require a party to seek a rehearing before proceeding with an appeal. See, *e.g.*, *Market Street Rail Co. v. Railroad Comm. of Calif.*, 324 U.S. 548, 551-52 (1944). Similarly, in the instant case, the fact that an opportunity exists for a second rehearing does not affect the appealability of the order entered by the Alabama Supreme Court.[8]

Federal Arbitration Act to interstate commerce contracts." *Tennessee River Pulp & Paper Co. v. Eichleay Corp.*, 637 S.W.2d 853, 858 (Tenn. 1982). See, also, *West Point-Pepperell, Inc. v. Multi-Line Industries, Inc.*, 201 S.E.2d 453 (Ga. 1973); *Fite & Warmath Const. Co., Inc., v. MYS Corp.*, 559 S.W.2d 729 (Ky. 1977); *Burke County Pub. Schools Bd. of Ed. v. Shaver Partnership*, 279 S.E. 816 (N.C. 1981); *Episcopal Housing Corp. v. Federal Ins. Co.*, 239 S.E.2d 647 (S.C. 1977).

[5]See, *e.g.*, *Commercial Metals Co. v. Balfour, Guthrie & Co.*, 577 F.2d 264, 289 (5th Cir. 1978) ("It is clear that the state courts are entirely able, *as well as required*, to apply the [Federal] Arbitration Act and compel arbitration pursuant to the Act if the statutory requisites are present." [emphasis added]).

[6]Sup. Ct. R. 17(b).

[7]*Code of Alabama* § 12-2-13 (1975). The Alabama Supreme Court has acknowledged the reality of the situation. Dealing with the very statute cited by Appellees that court has stated: "This is the second appeal in this case, and the decree from which this appeal was taken conformed to the opinion of the court. . . . This appeal, therefore, involves the soundness of said opinion, *and is in the nature of a second application for rehearing.*" *Bank of Luverne v. Reddoch*, 211 Ala. 699, 100 So. 922 (1924) (emphasis added).

[8]This is particularly true where the order in question has been considered by all nine justices of the Alabama Supreme Court and there were lengthy majority concurring and dissenting opinions.

The issues raised by Appellants are obviously substantial. The Alabama court made definitive rulings on the only federal issue involved in the case – does the Federal Arbitration Act apply to suits involving interstate commerce pending in state courts? The Alabama court first ignored the explicit holdings of this Court in *Moses Cone* and then held that if this Court meant what it clearly said in *Moses Cone,* the Federal Arbitration Act so interpreted was unconstitutional. Under these circumstances, action by this Court is both necessary and proper.

Respectfully submitted,

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